Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–355 OF 2005
ROHANA YUSUF J
13 FEBRUARY 2008

Civil Procedure — Preliminary issue — Application for issues or questions raised in pleadings to be tried on preliminary basis — Whether plaintiff's application under O 14A of the Rules of the High Court 1980 ('the RHC') contemptuous of or contradictory to earlier order made under O 14 of the RHC — Whether plaintiff's application barred by res judicata — Whether application under O 14A of the RHC appropriate to determine issues raised

Contract — Consideration — Failure of consideration — Whether agreements void for want of consideration

Contract — Terms — Interpretation of terms — Restructuring agreements — Parties agreed certificate of indebtedness conclusive evidence — Whether contractually bound by terms of agreements — Whether charges of interest within agreed terms

Sime Bank Bhd granted four loan facilities to certain borrowers ('initial borrowers') that were secured by a corporate guarantee of Melewar Leisure Sdn Bhd ('the first defendant') and the personal guarantees of the second and third defendants. Later, all rights and interests in respect of the initial borrowers' loan vested in Danaharta Managers Sdn Bhd ('the plaintiff') pursuant to vesting certificates under s 14 of the Pengurusan Danaharta Nasional Berhad Act 1998. Thereafter, when the initial borrowers defaulted in their loan facilities, by joint agreement of the initial borrowers, the balance of the outstanding debts were assumed by the first defendant. On request, the plaintiff also allowed the initial borrowers' debt to be restructured whereby a portion was repaid by the initial borrowers and the balance was novated to the first defendant whereupon the initial borrowers were released from all their obligations to the plaintiff. The novated debt was then restructured to give time to the first defendant to repay. The second and third defendants then became guarantors to the novated debts. When the first defendant defaulted in making monthly payment pursuant to the novation and

restructuring agreements, the plaintiff issued a notice of demand for payment. The plaintiff proceeded with letters of demand to the second and third defendants as guarantors when no payments were made. The plaintiff then commenced an action against the three defendants to recover the outstanding loan. The plaintiff's application under O 14 of the Rules of the High Court 1980 ('the RHC') was dismissed and the defendants were given unconditional leave to defend this action. This is the plaintiff's application under O 14A of the RHC seeking the court's determination on the validity of the agreements between the parties for want of consideration; the validity of the interest charges; and the conclusiveness of the certificate of indebtedness. The first defendant raised preliminary issues to this application on the grounds that the plaintiff's O 14A application was an abuse of process because it was contemptuous of, or contradictory to the earlier order made by the court under O 14 of the RHC; that the plaintiff's application is barred by res judicata or multiplicity of proceedings; that O 14A of the RHC is inappropriate to determine the issues raised in this action. In effect, the main issue for consideration in this O 14A application was whether there were any merits in the objections raised by the defendants, for, in the absence of any merits judgment could be entered against all the defendants upon the terms of the application.

Held, allowing the application with costs:

(1) In deliberating on an application under O 14 of the RHC, the court needs to only be satisfied whether or not the defendant had raised any sustainable defence which deserves a trial. Whereas, under O 14A of the RHC, the court will determine the issues of laws upon the construction of documents whenever it appears to the court that the determination of any questions of law will lead to a final conclusion of the action because there are no facts in dispute. Therefore, even if the plaintiff in this case had failed in its application to enter summary judgment under O 14 there was nothing to stop the plaintiff from proceeding with an O 14A application when facts were not disputed and the determination of issues would dispose of the case finally (see paras 7–8).

(2) The unconditional leave to defend granted under the O 14 application was not a judgment but only a decision. It is settled law that in order for the doctrine of res judicata to apply, the earlier proceeding must have resulted in a final judgment. In any event, issues for determination under the O 14A application could not have been brought up in the earlier O 14 application because under O 14, the court was not able to make the kind of finding that was sought under an O 14A application. Thus, the plaintiff's O 14A application was not barred by res judicata (see paras 10–12).

(3) It was evidently clear upon a perusal of the application and the documents filed in support that the disputes raised in this case pertained to questions of law, the validity of the agreements and construction of its various clauses. It is trite law, that agreements when signed would bind the parties in the absence of fraud and misrepresentation. In the circumstances, an application under O 14A of the RHC is the most appropriate mode to employ (see paras 15–16).

(4) In the instant case, the consideration to the first defendant could be summed up as the agreement by the plaintiff to release and discharge the initial borrowers from all claims in respect of the novated debts, the forbearing to exercise the plaintiff's rights against the defendants' guarantee of the initial borrowers' debts and the time indulgence to resolve the novated debt by the restructuring agreements. Further to that, the release of the initial borrowers from the novated debts was good consideration to the second and third defendants. Thus, the defendants' argument that these agreements were void for want of consideration was not sustainable (see paras 17–18).

(5) The plaintiff had, in charging interest, acted within the terms of the restructuring agreements and thus the first defendant was barred from denying the agreed terms. In the same way the second and third defendants were also bound by the terms of their guarantees in guaranteeing the amount owed by the first defendant. Thus, the defendants' contention that the computation of the interest was without basis was wrong, as the interest charged by the plaintiff was within the contractual terms (see paras 20–21).

(6) The defendants, by agreeing in the restructuring agreements that a statement issued by the plaintiff showing indebtedness was binding and conclusive between them, were contractually bound by it. Moreover, although the plaintiff is not a financial institution it is nevertheless a regulated entity under an Act of Parliament, the Danaharta Act. In any case, the plaintiff had also produced the statements of accounts on which the certificate of indebtedness was raised for the defendants and the latter had not established any manifest error to dispute it. Therefore, the certificate of indebtedness was conclusive proof of the amount indebted by the defendants under the novation agreement, restructuring agreements as well as the guarantees (see paras 23–24).

[Bahasa Malaysia summary

Sime Bank Bhd memberikan empat kemudahan pinjaman kepada peminjam-peminjam tertentu ('peminjam-peminjam awal') yang dijamin oleh jaminan korporat oleh Melewar Leisure Sdn Bhd ('defendan pertama') dan jaminan peribadi oleh defendan-defendan kedua dan ketiga. Kemudian

kesemua hak-hak dan kepentingan-kepentingan berkaitan dengan pinjaman peminjam-peminjam awal terletak hak kepada Danaharta Managers Sdn Bhd ('plaintif') menurut sijil meletak hak di bawah s 14 Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta Danaharta'). Selepas dari itu, apabila peminjam-peminjam awal gagal membayar balik kemudahan pinjaman, melalui perjanjian bersama di antara peminjam-peminjam awal, baki tertunggak hutang diambil alih oleh defendan pertama. Atas permintaan, plaintif juga membenarkan hutang-hutang peminjam-peminjam awal disusun semula di mana sebahagiannya telah dibayar oleh peminjam-peminjam awal dan bakinya dinovasi kepada defendan pertama di mana peminjam-peminjam awal dilepaskan daripada kesemua tanggungjawab mereka terhadap plaintif. Hutang yang dinovasi tersebut kemudian disusun semula untuk memberikan defendan pertama masa untuk membayar balik. Defendan-defendan kedua dan ketiga kemudian menjadi penjamin kepada hutang-hutang yang dinovasi tersebut. Apabila defendan pertama gagal membuat pembayaran bulanan menurut perjanjian-perjanjian novasi dan penyusunan semula, plaintif mengeluarkan notis tuntutan untuk pembayaran. Plaintif meneruskan dengan surat-surat tuntutan kepada defendan-defendan kedua dan ketiga sebagai penjamin-penjamin apabila tiada pembayaran dibuat. Plaintif kemudian memulakan tindakan terhadap ketiga-tiga defendan untuk mendapatkan semula pinjaman yang tertunggak. Permohonan plaintif di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') ditolak dan defendan-defendan diberikan kebenaran tanpa syarat untuk membela tindakan tersebut. Ini adalah permohonan plaintif di bawah A 14A KMT memohon keputusan mahkamah terhadap kesahan perjanjian-perjanjian tanpa balasan; kesahan bayaran faedah; dan kemuktamadan sijil keberhutangan. Defendan pertama membangkitkan isu awalan terhadap permohonan ini atas alasan-alasan bahawa permohonan A 14A plaintif adalah penyalahgunaan proses mahkamah kerana ia adalah menghina atau bertentangan dengan perintah terdahulu yang dibuat oleh mahkamah di bawah A 14 KMT; bahawa permohonan plaintif dihalang oleh res judicata atau kepelbagaian prosiding; bahawa A 14A KMT tidak sesuai untuk menentukan isu-isu yang dibangkitkan di dalam tindakan ini. Pada dasarnya, isu utama untuk dipertimbangkan di dalam permohonan A 14A ini adalah sama ada terdapat merit di dalam bantahan yang dibangkitkan oleh defendan-defendan, kerana, jika tidak ada merit, penghakiman boleh dimasukkan terhadap kesemua defendan-defendan atas terma-terma permohonan.

Diputuskan, membenarkan permohonan dengan kos:

(1) Dalam mempertimbangkan permohonan di bawah A 14 KMT, mahkamah hanya perlu memenuhi sama ada atau tidak defendan telah membangkitkan pembelaan yang mencukupi yang patut dibicarakan.

Manakala, di bawah A 14A KMT, mahkamah akan memutuskan isu-isu undang-undang atas pentafsiran dokumen-dokumen apabila ia kelihatan kepada mahkamah bahawa penentuan apa-apa persoalan undang-undang akan membawa kepada kesimpulan muktamad tindakan tersebut kerana tidak ada fakta yang dipertikaikan. Oleh itu, walaupun plaintif di dalam kes ini gagal di dalam permohonannya untuk memasukkan penghakiman terus di bawah A 14 tidak ada apa-apa yang menghalang plaintif daripada meneruskan dengan permohonan A 14A apabila fakta-fakta tidak dipertikaikan dan pemutusan isu-isu akan memutuskan kes tersebut secara muktamad (lihat perenggan 7–8).

(2) Kebenaran tanpa syarat untuk membela yang diberikan di bawah permohonan A 14 bukan suatu penghakiman tetapi hanya satu keputusan. Ia adalah undang-undang mantap bahawa, untuk doktrin res judicata beraplikasi, prosiding sebelumnya sepatutnya menghasilkan penghakiman yang muktamad. Walau bagaimanapun, isu-isu untuk dipertimbangkan di bawah permohonan A 14A tidak mungkin boleh dikemukakan di bawah permohonan A 14 sebelum ini kerana di bawah A 14, mahkamah tidak boleh membuat penemuan seperti yang dipohon di bawah permohonan A 14A. Oleh itu, permohonan A14A plaintif tidak dihalang oleh res judicata (lihat perenggan 10–12).

(3) Ia adalah cukup jelas daripada penelitian permohonan dan dokumen-dokumen yang difailkan untuk menyokong bahawa pertikaian yang dibangkitkan di dalam kes ini adalah mengenai persoalan undang-undang, kesahan perjanjian-perjanjian tersebut dan pentafsiran berbagai klausa di dalamnya. Ia adalah undang-undang nyata bahawa perjanjian apabila ditandatangani akan mengikat pihak-pihak jika tidak melibatkan fraud atau salah nyata. Dalam hal keadaan ini, permohonan di bawah A 14A KMT adalah cara yang paling sesuai untuk digunakan (lihat perenggan 15–16).

(4) Di dalam kes ini, balasan untuk defendan pertama boleh diringkaskan sebagai perjanjian oleh plaintif untuk membebaskan dan melepaskan peminjam-peminjam awal daripada semua tuntutan yang berkaitan dengan hutang-hutang yang dinovasi, menahan daripada melaksanakan hak-hak plaintif terhadap jaminan defendan-defendan untuk hutang-hutang peminjam-peminjam awal dan kelonggaran masa untuk menyelesaikan hutang yang dinovasi melalui perjanjian-perjanjian yang disusun semula. Selanjutnya, pelepasan peminjam-peminjam awal daripada hutang-hutang yang dinovasi adalah balasan yang baik untuk defendan-defendan kedua dan ketiga. Oleh itu, hujahan defendan-defendan bahawa perjanjian-perjanjian ini adalah batal kerana ketiadaan balasan, tidak boleh diterima (lihat perenggan 17–18).

(5) Plaintif telah, dalam mengenakan faedah, bertindak dalam lingkungan terma-terma perjanjian-perjanjian susun semula dan oleh itu defendan pertama dihalang daripada menafikan terma-terma yang telah dipersetujui. Dalam keadaan yang sama, defendan-defendan kedua dan ketiga juga terikat oleh terma-terma jaminan dalam menjamin jumlah yang terhutang oleh defendan pertama. Oleh itu, hujahan defendan-defendan bahawa pengiraan faedah adalah tanpa asas adalah salah, kerana faedah yang dikenakan oleh plaintif adalah dalam lingkungan terma-terma kontrak (lihat perenggan 20–21).

(6) Defendan-defendan, dengan bersetuju dalam perjanjian penyusunan semula, bahawa penyata yang dikeluarkan oleh plaintif menunjukkan keberhutangan adalah mengikat dan muktamad di antara mereka, adalah terikat secara kontrak dengannya. Tambahan, walaupun plaintif bukan sebuah institusi kewangan, ia adalah sebuah entiti yang dikawal melalui Akta Parlimen, iaitu Akta Danaharta. Walau bagaimanapun, plaintif juga telah mengemukakan penyata akaun di atas mana sijil keberhutangan telah dibangkitkan untuk defendan-defendan dan mereka tidak membuktikan sebarang kesilapan untuk mempertikaikannya. Oleh yang demikian, sijil keberhutangan adalah bukti muktamad mengenai jumlah yang terhutang oleh defendan-defendan di bawah perjanjian novasi, perjanjian-perjanjian disusun semula dan juga jaminan-jaminan (lihat perenggan 23–24).]

Notes

For a case on failure of consideration, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3031.

For cases on application for issues or questions raised in pleadings to be tried on preliminary basis, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5825–5826.

For cases on interpretation of terms, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5361–5366.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5 (refd)

Bank Kerjasama Rakyat Bhd & Ors v Haji Mat @ Mat Shah bin Haji Ahmad @ Sapuan [2007] 3 MLJ 541 (refd)

Cempaka Finance Bhd v Ho Lai Ying (berniaga atas nama KH Trading) & Anor [2006] 2 MLJ 685 (refd)

Dato' Mohamed Anuar bin Embong v ING Merchant Bank (Singapore) Ltd (formerly known as Internationale Nederlanden Merchant Bank (Singapore) Ltd & Anor [2000] 6 MLJ 461 (refd)

Guthrie Waugh Bhd v Malaippan Muthucumaru [1972] 1 MLJ 35 (refd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 (refd)
Serangoon Garden Estate Ltd v Marian Chye [1959] MLJ 113 (refd)
United Commercial Bank v Yap Cheng Hai & Ors [1980] 1 MLJ 207 (refd)

Legislation referred to
Rules of the High Court 1980 O 14, O 14A
Contracts Act 1950 s 2(d)
Pengurusan Danaharta Nasional Berhad Act 1998 s 14

Tan Gian Chung (Stephanie Foo with him) for the plaintiff.
Yap Mow Jiun (Heng & Co) for the first defendant.
Kavimani Muthayam (Megat Najmuddin Leong & Co) for the second & third defendant.

Rohana Yusof J:

[1] The application by the plaintiff in encl 25 was made under O 14A of the Rules of the High Court 1980 ('the RHC'). Essentially encl 25 requires the court to determine the validity of the agreements between parties for want of consideration; the validity of the interest charges; and the conclusiveness of the certificate of indebtedness. Upon the determination of all these issues in favour of the plaintiff the court may enter judgments against all the defendants upon the terms stated in the said encl 25.

BRIEF FACTS

[2] Sime Bank Bhd ('SBB') granted four loan facilities to four companies namely; BistroAmericana (M) Sdn Bhd ('BAM'), BistroAmericana (PJ) Sdn Bhd ('BAPJ'), BistroAmericana (SJ) Sdn Bhd ('BASJ') and BistroAmericana ('JB') Sdn Bhd ('BAJB'). All these four borrowers shall hereafter be referred to collectively as the 'initial borrowers'.

[3] All the four loan facilities were secured by a corporate guarantee of Melewar Leisure Sdn Bhd ('the first defendant') and the personal guarantees each by Tunku Abdullah Ibni Almarhum Tunku Abdul Rahman ('the second defendant') and Tunku Iskandar bin Tunku Abdullah ('the third defendant'). The initial borrowers defaulted in their payment obligations under the loan facilities.

[4] All rights and interests of SBB in respect of the initial borrowers' loan vested in the plaintiff, Danaharta Managers Sdn Bhd pursuant to vesting certificates under s 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('Danaharta Act') on 1 June 1999 and 15 December 1998 respectively.

On 6 May 2002 the balance outstanding debt by the initial borrowers were assumed by the first defendant. All the four borrowers confirmed and agreed for the outstanding debt under the loan agreements and the corporate guarantee to be transferred to the first defendant.

[5] The outstanding due and owing totaling RM7,738,229.62 from the initial borrowers to the plaintiff were partly restructured into a term loan. RM3,000,000 was repaid to the plaintiff, whilst the balance debt was novated and taken over by the first defendant. The novated debt was then restructured into four sets of restructuring and novation agreements dated 5 September 2003 and exhibited as exhs DMSB-3 and DMSB-4, DMSB-6 and DMSB-7 as well DMSB-12 and DMSB-13 to be referred to collectively as the 'novation and restructuring agreements'. The second defendant and the third defendant entered into three joint and several guarantees and indemnities, with respect to the novated debt of three of the initial borrowers namely BAM, BAPJ and BASJ. In respect of novated debt of BAJB, the third defendant alone provides a personal guarantee.

[6] The first defendant defaulted in making monthly payment pursuant to the said novation and restructuring agreements. Notice of demand was issued to the first defendant. No payment was made. Letter of demand was then issued to the second and third defendant as guarantors.

PRELIMINARY ISSUES

[7] The counsel for the first defendant raised a few preliminary issues. First, learned counsel for the first defendant Encik Yap Mow Jiun (Cik Kavimani Muthayam for the second and third defendants, adopting all his submissions) contended that the application of the plaintiff under O 14A of the RHC is contemptuous of, or contradictory to the earlier order made by this court which has dismissed the application of the plaintiff under O 14 of the RHC. According to Encik Yap, Wahab Patail J had, in deliberating on the O 14 application remarked in open court that 'there is nothing simple in this matter', then proceeded to dismiss the application of the plaintiff under O 14 of the RHC with costs. The learned judge then granted the defendants unconditional leave to defend this action. It is the contention of the counsel for the defendants that to allow the plaintiff to proceed with another summary proceeding such as this encl 25 would be in contradiction to that earlier order, depriving the defendants from defending themselves which was granted by the court under O 14 application. This, according to Encik Yap would lead to gross injustice and would be an abuse of process.

[8] To answer the issue raised by the defendants on this point, it would be pertinent to note that in deliberating on an application under O 14 of the

RHC, the court needs only be satisfied whether or not the defendant has raised any sustainable defence. In response to Encik Yap's submission learned counsel for the plaintiff Encik Tan Gian Chung (Cik Stephanie Foo with him) cited the case of *Bank Kerjasama Rakyat Bhd & Ors v Haji Mat @ Mat Shah bin Haji Ahmad @ Sapuan* [2007] 3 MLJ 541 as an authority. In that case notwithstanding that the plaintiff has failed in an application under O 14A of the RHC the court finds that an application under O 14A of the RHC is a fit and proper way to dispose of the case. Rightly so, because an application under O 14A of the RHC is different in nature and the scope involved are different. I am in full agreement with that decision as well as the submission of Encik Tan on this point. This is because under O 14A of the RHC, the court needs only be satisfied whether there is a triable issue before it can determine to allow a summary judgment. To do that the court will have to examine whether the defendant has raised any defence with merits which deserves a trial. If so, leave will be granted to the defendant to file defence. However, under O 14A of the RHC the court will determine the issues of laws and or the construction of documents whenever it appears to the court that such question can be determined without a full trial. The construction of document which requires the determination of any question of law will lead to a final conclusion of the action. Oral testimonies are dispensed with because there is no fact in dispute. Looking at the differences in the approaches to be taken in determining the application under O 14A with that under O 14A, in my view, even if the plaintiff has failed in its application to enter a summary judgment under O 14A there is nothing to stop the plaintiff to proceed with O 14A application when facts are not disputed and the determination of issues raised will dispose of the case finally.

[9] Encik Yap also raised and relied on the argument that the application of the plaintiff in encl 25 is barred by res judicata or multiplicity of proceeding. He further submitted that the plaintiff's application under O 14A RHC has been dismissed by this court and the plaintiff's appeal on that decision is pending at the Court of Appeal. The application by the plaintiff according to him tantamount to re-litigating the same issues hence should not be allowed, citing in authority the case of *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.

[10] In response Encik Tan argued that unconditional leave to defend granted under O 14A is not a judgment. Relying on the case of *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207, Encik Tan contends that for res judicata to apply there must be a judgment on that issue before the court. Both the cases of *Dato' Mohamed Anuar bin Embong v ING Merchant Bank (Singapore) Ltd (formerly known as Internationale Nederlanden Merchant Bank (Singapore) Ltd & Anor* [2000] 6 MLJ 461 and *Kandiah Peter v Public Bank Berhad* [1994] 1 MLJ 119 are also good authorities on the

point that the doctrine of res judicata will apply only if the earlier proceeding result in final judgment or final determination of a particular issue in question.

[11] Res judicata has been defined by Sinnathuray J, in the Singapore case of *United Commercial Bank*. In that case Sinnathuray J had broadly defined res judicata as to refer to a situation where there is already judgment on the issues that are before the court. Would there be judgment made in the dismissing of O 14A application, one may asks. The answer is no because an order granting leave to defend is not a judgment but it is only a decision. This is the legal point stated in the *United Commercial Bank*. Also, in the case of *Kandiah Peter*, the Supreme Court states that it is settled law that in order for the doctrine of res judicata, cause of action estoppel or issue estoppel, to apply, the earlier proceeding must have resulted in a final judgment.

[12] I have also considered the decision of the Supreme Court in *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 cited by Encik Yap. He pointed out that the Supreme Court hold that the doctrine of res judicata is not only confined to causes of action or issues which the court is actually asked to decide or has already decided, but also covers cause of action or issues or facts which, though not already decided as a result of the same had not being brought forward. Be that as it may, issues for determination under this O 14A application could not have been brought up in that O 14A application for obvious reason. Under O 14A application the court is not able to make the finding sought under this O 14A application. Hence, I do not find this argument relevant to the issues at hand. I hold that the application of the plaintiff in encl 25 is not barred by res judicata.

WHETHER THE MODE IS PROPER

[13] The defendants also questioned the suitability of the mode of the application of the plaintiff under O 14A of the RHC in this case. Whether O 14A of the RHC is appropriate to determine issues or questions raised in this application without a full trial will be dependent on the questions and issues that are brought for determination. The main test to be applied is whether the determination of the question raised, would lead to the final determination of the cause or matter. The issues raised by the defendant involve the construction of various documents namely the novation and the restructuring agreements and the guarantees.

[14] It must be noted that in raising the objections to the claim of the plaintiff, the defendants raised four main issues in the statement of defence. First, the first defendant contends that the four novation and restructuring

agreements are void for want of consideration. Secondly, the first defendant denies the existence of the corporate guarantee earlier given in respect of the initial borrowers. Thirdly, the levying of penalty interest by the plaintiff and fourthly the defendants contend that the plaintiff, not being a financial institution cannot rely on the certificate of Indebtedness. Two other issues that were raised by the second and the third defendants are that both of them have no knowledge of the novation exercise and they are not principal debtor of the plaintiff.

[15] The issues raised by defendants clearly call for the determination and the constructions of the agreements entered between the plaintiff and the defendants. The defendants never disputed executing all the agreements in question. In encl 25A parties have already filed into court all the agreed issues and facts during the case management process. Enclosure 25 clearly discloses that the dispute is centred on issues of law and construction of documents as all questions of facts have been conceded to by the parties. Encik Yap attempted to deny that the agreed facts filed therein have been agreed or rather he contended that they were filed as agreed facts, but not pertaining to the O 14A application. I find this argument rather baffling. Is it not the purpose of a case management process, that the parties will attempt to narrow down issues to be set down for trial where facts already agreed need not be proceeded with, any further. Parties are bound by the issues and facts that have been agreed at the pre-trial case management process otherwise, the case management would become an exercise in futility. It is evidently clear upon perusal of encl 25 and encl 25A that the dispute raised pertain to question of law, validity of the agreements and construction of its various clauses. In the Court of Appeal case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, Mohd Noor Ahmad JCA (as he then was) states that O 14A was introduced to expedite the disposal of action even at interlocutory stage to save costs and time. It enables the court to determine any question of law or the construction of documents without full trial. Looking at the plaintiff's application in encl 25, I do not find a more appropriate mode for the plaintiff to employ than an application under O 14A of the RHC.

[16] It is trite law, that agreements when signed will bind the parties in absence of fraud or misrepresentation. The case of *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 is a direct authority on point. There is also no dispute that the second and third defendants duly executed the guarantees exhibited in DMSB-14 to DMSM-17

[17] I will now proceed to deal with the objections raised by defendants in the statement of defence. The defendants are questioning the validity of these agreements on the following grounds.

(a) Consideration

The defendants pleaded that the novation and restructuring agreements are void for want of consideration. From the factual background, the initial borrowers have defaulted in their loan facilities. The plaintiff allowed the initial borrowers' debt to be restructured whereby; a portion was repaid by the initial borrowers and the balances were novated to the Melewar Leisure Sdn Bhd, the first defendant. The first defendant was a guarantor by virtue of a corporate guarantee issued to the plaintiff under the initial borrowing agreements. As a corporate guarantor, Melewar Leisure Sdn Bhd, was liable to pay the loan by the initial borrowers. On request, the plaintiff allowed the initial borrowers to pay a portion of the loan and the balance of which was novated to the first defendant. Thereafter, the novated debt was restructured to give time to the first defendant to repay. At that same time the initial borrowers were released of their obligations. The first defendant's liability to the novated loan will now be subject to a one month's notice demanding payment. From all these restructuring exercise, I agree with the Encik Tan, counsel for the plaintiff, that there are valid consideration to the novation and restructuring agreements as discussed below.

[18] 'Consideration' is defined under s 2(d) of the Contracts Act 1950 as follows:

> when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

In the present case the consideration to the first defendant can be summed up as the agreement by the plaintiff to release and discharge the initial borrowers from all claims in respect of the novated debts, the deferment or forbearing to exercise the plaintiff's rights against the defendants' guarantee of the initial borrowers debt and the time indulgence to resolve the novated debt by the restructuring agreements. These are all valid and good consideration following the definition under s 2(d) of the Contracts Act 1950. In the case of *Guthrie Waugh Bhd v Malaippan Muthucumaru* [1972] 1 MLJ 35 a forbearance to exercise a legal right is good consideration.

[19] The second and third defendants are both guarantors to the novated debts. As a security to the loan facility to the initial borrowers a corporate guarantee dated 23 March 1994 was executed by the Melewar Leisure Sdn Bhd, to secure that financing. The novation agreements executed by the first defendant make reference to the corporate guarantee and both defendants cannot therefore deny the existence of the guarantees. The deferment or forbearance to exercise the rights by the plaintiff against the defendant under the original guarantee to the initial borrowers is itself a valid consideration to

these two defendants. Not for the novation of the debt to the first defendant the immediate liability of the second and the third defendants under the guarantee would have accrued. Further to that the release of the initial borrowers from the novated debts is good consideration to the second and third defendant. Thus the argument that these agreements are void for want of consideration is not sustainable.

[20] The second and third defendants did not dispute the execution of guarantees and hence are bound by all the guarantees issued by them and are thereby estopped from their plea of ignorance of the novated debts.

(b) Penalty interest

[21] The next defence put forward by counsel for the defendants is on issue of interest. The plaintiff in pursuing the claim against the defendants is computing the balance by charging interest pursuant to cl 4.1 of the restructuring agreements exhibited in DMSB-4 (cl 4.1 is found in all the 4 restructuring agreements). Under this agreement the first defendant has agreed to pay interest to the plaintiff at the rate of 2% above the base lending rate ('BLR') of Malayan Banking Berhad, as its prescribed rate. The interest rate is to be computed on daily basis, payable monthly. Further, under cl 4.2 of the restructuring agreement the first defendants has agreed to pay default interest of 1% per annum above the prescribed rate in cl 4.1 on monthly rests for all overdue sums. It is also the term of the agreements that the plaintiff may capitalise the interest at its sole discretion.

[22] From the above, I find that the plaintiff has, in charging interest acted within the terms of the agreements and the first defendant is barred from denying the agreed terms. In the same way the second and third defendants are bound by the terms of their guarantees in guaranteeing the amount owed by the first defendant. The guaranteed amount which would include all monies whether principle, interest, costs charges or any other monies agreed to be payable by first defendant under the restructuring agreements is clearly provided under section 3.01(1)(a) of the guarantee and indemnities in DMSB-14 (this clause is also found in all the guarantee and indemnities exhibited in DMSB–15–DMSB-17). Thus the argument by Encik Yap for the defendants on the wrong computation of interest is without basis.

(c) Certificate of indebtedness

[23] The next argument put forward by Encik Yap is on the validity of the certificate of indebtedness. It is noted that parties have agreed under cl 17.1 of the four restructuring agreements (see exhs DMSB-4–DMSB-7, DMSB-10 and DMSB-13) that a statement issued by the plaintiff showing

indebtedness as binding and conclusive between them. The plaintiff has issued such certificate under cl 17.1 of the said agreements. Pursuant to section 7.03 of the guarantees (see exhs DMSB-14–DMSB-16) both the second and third defendants have also agreed to accept certificate of indebtedness as binding and conclusive evidence of indebtedness. Similarly, in DMSB-17 the personal guarantee of the third defendant contains similar clause and the third defendant is therefore bound by the same.

[24] Encik Yap contends that such certificates of indebtedness is only a privilege of financial institution and cannot be used by the plaintiff here as a conclusive proof of indebtedness. He referred to the case of *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5 a decision of the High Court of Singapore, where Yong Pung How J held that the wide spread use of 'conclusive evidence' clause has arisen because of the dictate of commerce. Yong Pung How J also observed that the use of such clause has been supported by an assumption that financial institutions are closely regulated by law. Encik Yap contends that the plaintiff here is not a financial institution and should not be entitled to use such certificate.

[25] First, it is clear that the parties have agreed to the use of conclusive evidence in the certificate of indebtedness and are therefore contractually bound by it. Parties have agreed in all the agreements to the conclusiveness of the certificate of indebtedness issued by the plaintiff. The plaintiff, even though not a financial institution is a regulated entity under an Act of Parliament, the Danaharta Act. In any case, the statement of accounts has also been produced by the plaintiff to the defendants. The legal position of the certificate of indebtedness is well settled in the Federal Court case of *Cempaka Finance Bhd v Ho Lai Ying (berniaga atas nama KH Trading) & Anor* [2006] 2 MLJ 685 and needs no further deliberation. The defendant has not established any manifest error to dispute the certificate.

[26] In conclusion I do not find any merits in the objections raised by the defendants. I find that there are valid consideration provided by the plaintiff for all the novation agreements, restructuring agreement and guarantees. The interest charged by the plaintiff is within the contractual term of the parties. The certificate of indebtedness is a conclusive proof of the amount indebted by the defendants under the novation agreement, restructuring agreement as well as the guarantees. The defendant did not establish any manifest error on the said certificate.

[27] In view of the above I hereby allow the plaintiff's application in encl 25 with costs. A

Application allowed with costs.

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Reported by K Nesan

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